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JAMES R. BROWNING, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 497

WILLARD H. PHILLIPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

ANTHONY T. ANTINOZZI
Counsel for Petitioner
120 Broadway
New York 5, New York
Telephone: REctor 2-2000

Of Counsel:

HENRY W. SCHOBER
150 Old Country Road
Mineola, New York

FRANK A. FRITZ, JR.
120 Broadway
New York 5, New York

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Opinion Below

The decision of the Court of Appeals of the State of New York affirming petitioner's conviction of murder in the first degree is reported at 6 N.Y. 2d 788, Advance Sheet #182, issued July 22, 1959; 188 N.Y.S. 2d 184 (R. pp. 504-505). No opinion was rendered by the Court of Appeals upon its decision.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1959 (R. pp. 504-505). On June 25, 1959, that Court

denied an application for reargument, without opinion, but amended the remittitur by reciting that questions under the Constitution of the United States had been necessarily considered in decreeing affirmance (R. pp. 505-506). Such denial of reargument and amendment of remittitur are reported at 6 N.Y. 2d 882 and 6 N.Y. 2d 881, respectively, both appearing in Advance Sheet #185, issued August 12, 1959; 188 N.Y.S. 2d 1001. Petition for writ of certiorari was filed August 24, 1959, and was granted October 26, 1959. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

Constitutional Provision Involved

The Constitution, Fourteenth Amendment, Section 1, provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

Question Presented

Whether the use of confessions, not freely or voluntarily given but admittedly "exacted" from petitioner after a lengthy inquisition following his protestations of innocence, amounted to a denial of due process.

Statement

Petitioner was adjudged guilty of felony-murder after trial by jury in the Nassau County Court. The jury did not recommend leniency and the death sentence was imposed. The pertinent facts are as follows:

On May 12, 1958, Sunday Graham, 8 years of age, failed to return from school to her home at Hempstead, Long

Island, New York (91-94, 105, 179, 185).* A missing persons alarm was issued and Detective Rofheart of the Nassau County Police thereafter interviewed Sunday's stepmother and, on the morning of May 13th, interviewed her classmates (231-233). The stepmother, who was a former wife and then paramour of Phillips, testified that shortly prior to May 12th she had told him to get out of her life. He replied that he would not get out "alone" and "would get even" (111-116). A classmate testified that on May 12th she had seen Sunday enter an auto driven by a negro male wearing a white cap and tan jacket (182-187).

At about 11 A.M., May 13th, and as the evident result of the aforesaid interviews, Rofheart called on Phillips at his Hempstead home, questioned him about his activities the previous day and searched his apartment (233-238, 297). Phillips, a 42-year-old unemployed negro with a record of morals offenses in Nassau County (704-711), owned an auto and clothing similar to those observed by Sunday's schoolmate (26, 188-191; Exhs. 11-13, pp. 444-446).

Phillips spent the next 23 hours in police custody without being arraigned. He steadfastly maintained innocence for over 18 hours, confessing for the first time shortly after 5:00 A.M., May 14, 1958. During those 18 hours he was persistently questioned, had no food or drink and was without friendly advice or legal counsel. He was subjected to humiliating treatment by the police, confronted by the victim's stepmother and uncle, and was accorded no opportunity to lie down and sleep although he had risen at 6:15 A.M. on May 13th, was sleepy, and dozed occasionally while seated in a chair.

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* Unless otherwise indicated, numbers in parentheses refer to folios of printed record on appeal to New York State Court of Appeals.

The details of Phillips' detention and interrogation follow:

After the initial questioning at his home by Detective Rofheart, Phillips was brought to a Detective Squad Office in Williston Park, arriving there at about 1:15 P.M., May 13th (238, 247). Rofheart questioned him for about an hour and a non-incriminatory statement was transcribed and signed at about 3:00 P.M. (255, 258, 291-292; Exh. 14, pp. 447-449). Nevertheless, Phillips was detained and Rofheart "talked to him further" (258-259).

At about 4:00 P.M., a report was received of the discovery of the violated body of a young negro girl in Garden City (258-259). Rofheart, Detective Diggs, Sergeant Owens and Lieutenant Curran then resumed the questioning which went on "not continually but on and off" until 6:30 P.M. (258, 302-307, 333-334).

Rofheart conceded that upon learning of the discovery of the body there was reason to believe Phillips had committed the crime and that, although there was enough proof to arraign him, no effort was made to locate a magistrate (339-345, 348, 599). Rofheart testified that he "kept" Phillips in custody in order to "exact" a confession (293, 342-343, 346). Detective Stark of the Homicide Squad, who arrived at the Williston Park office at about 6:30 P.M., also had reason to believe, upon learning of the discovery of the body, that Phillips may have murdered Sunday Graham (587).

Inspector Pribyl and Dr. Lukash, who arrived shortly after Stark, sought permission to subject Phillips to certain tests—to wash his penis, obtain fingernail scrapings and examine his clothing—but he refused (259-261, 462-463). Phillips was hesitant, desired advice, and questioned the right of the police to make such tests (405, 410, 462-

463, 555). Pribyl, who felt he "could gain the confidence of the defendant alone, because he knew me" (513), told the others to leave so he could speak to him privately (404, 461-464, 555, 601). This short private conference secured its desired result—when Stark, Rofheart and Dr. Lukash were invited to return, Phillips, after seeing Pribyl drink some of the solution to be used, submitted to the tests (466-468), which had negative results (469, 470). At some indeterminate time, he was given clothing in place of that which had been taken from him (261).

After the completion of the tests, Stark and Rofheart continued to talk to Phillips (261-263, 318, 559). Commencing at 9 P.M., Captain Closs questioned him for forty-five minutes to an hour (264, 318). At 10 P.M., Rofheart, Stark and Captain Lada questioned him (263-265, 309, 320-321, 559). Stark had meanwhile spoken to the victim's stepmother and uncle, and brought each of them separately to Phillips. They conversed privately but were kept under observation (559-563). The questioning continued until about 2:30 the following morning. Before leaving defendant's presence at about 1 or 1:30 A.M., Rofheart spoke to him and Stark and Lieutenant Cummings then interrogated him until 2:30 A.M. (268, 564). Phillips continued his denial of complicity, his statement still being exculpatory (564).

Then, in the dead of night, Phillips was taken to police headquarters at Mineola, arriving there at about 3:00 A.M. (566). Detective Stark, Lieutenant Cummings, Captain Lada and Chief Pinnell there subjected him to further questioning but his story remained the same (566-567).

At all times prior to his confession after 5:00 A.M., May 14th, Phillips maintained his innocence. The stenographer who recorded his first confession was alerted by

the prosecuting attorney at 11:00 P.M., May 13th, but was not summoned to police headquarters until 4:15 A.M., May 14th (538-539). Likewise, the prosecuting attorney, though already present at headquarters when Phillips arrived there at 3:00 A.M., did not participate in the continuing interrogation until after 5:00 A.M. when he came into Phillips' presence for the first time (568-569, 609).

When questioned by the prosecuting attorney, Phillips first denied any complicity (1387-1429), but when falsely informed that the victim's blood was found on his clothes (1430)*, he remarked "I'm sunk", to which the prosecuting attorney replied "Well, we knew that before, * * * " (1437). Phillips then for the first time acknowledged the rape and murder of Sunday Graham. (Exh. 28, pp. 182, 462-487).

Another confession was obtained immediately thereafter by Stark (570; Exh. 29, pp. 191, 488).

Phillips was finally arraigned at 10:00 A.M. on May 14th (574). However, the inquisition did not then cease. After his arraignment, Phillips was driven about to various locations allegedly involved in the crime (574-577). He was brought to the police laboratory at about 11:30 A.M. where he identified certain portions of his clothing (474). Later, at about 1:00 P.M. that day, he was examined by the psychiatrist who gave rebuttal testimony for the People, including evidence of additional admissions of guilt (1006-1007, 1014).

Phillips testified that he had been "beaten around and forced to do different things"; that the constant interrogation "for almost two days" had left him in a state

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* Blood stains were discovered on soiled underclothing found in defendant's room but it was never determined whether the blood was the victim's, whether it was human or whether defendant had worn that clothing on the day of the crime (473-479).

of shock—"almost in a state of brain-wash"; that he "couldn't have been in a reasonable state of mind in order to be able to reason an answer"; that he "had no alternative" and, when questioned by the prosecuting attorney, parroted back the versions given him by the detectives, that being the easiest way out (805-808).

The People not only failed to call each officer who interrogated Phillips but failed to call each officer who was alone with him. Phillips was twice left alone with and questioned by Detective Diggs, who did not testify (306-307). Inspector Pribyl, who was left alone with him prior to the performance of the tests (601), was not asked whether he had employed coercion. For a brief period at about 2:30 A.M., May 14th, he was left alone with Lieutenant Cummings who did not testify (564-565). A portion of Stark's testimony suggests that, for an undisclosed period, at Mineola Headquarters, Phillips may have been alone with other police officers who did not testify—of the four officers who interrogated Phillips at Mineola, Stark alone was called by the prosecutor to testify and indicated that the prosecuting attorney came into Phillips' presence for the first time at 5:10 A.M. May 14th, and that a portion of the time spent in Mineola between 3:00 A.M. and 5:10 A.M. was consumed while "we explained the case to Mr. Cahn" (the prosecuting attorney) (568-569, 610-613). Meanwhile, Phillips doubtlessly was in the custody of some other police officer or officers who were not called to testify.

Apart from the confessions to the prosecuting attorney and Detective Stark and the written non-incriminatory statement to Rofheart, no transcription or record was made of Phillips' detention and questioning (619).

Summary of Argument

Petitioner's confessions resulted from intensive questioning and mistreatment during long incommunicado detention which was for the admitted purpose of exacting a confession and extended far beyond the time when the authorities were satisfied of petitioner's guilt and of their ability to arraign and charge him with the capital offense. The use of confessions secured by those coercive methods deprived petitioner of his constitutional right to due process.

ARGUMENT

I.

Petitioner Was Denied Due Process by the Improper Admission of Involuntary Confessions Into Evidence.

Due process prohibits the use of a confession which is not "the expression of free choice" but is, instead, the product of physical or mental pressure or the "suction process of interrogation". (*Spano* v. *New York,* 360 U.S. 315; *Payne* v. *Arkansas,* 356 U.S. 560, 562; *Fikes* v. *Alabama,* 352 U.S. 191; *Leyra* v. *Denno,* 347 U.S. 556; *Watts* v. *Indiana,* 338 U.S. 49, 53; *Malinski* v. *New York,* 324 U.S. 401; *Haley* v. *Ohio,* 332 U.S. 596; *Stroble* v. *California,* 343 U.S. 181; *Ashcraft* v. *Tennessee,* 322 U.S. 143; *Lyons* v. *Oklahoma,* 322 U.S. 596; *Lisenba* v. *California,* 314 U.S. 219).

If an independent review by this Court of the undisputed facts discloses that Phillips' confessions were not voluntarily given, the judgment of conviction must be reversed. (*Payne* v. *Arkansas,* 356 U.S. 560, 562; *Malinski* v. *New York,* 324 U.S. 401, 404). The presence of other independent evidence sufficient to sustain the conviction is irrele-

vant. (*Spano* v. *New York,* 360 U.S. 315, 324; *Malinski* v. *New York,* 324 U.S. 401, 404).

The following facts are uncontroverted: Phillips, a negro ex-convict, was in police custody for 18 hours before confessing and for 23 hours before being arraigned. He was questioned for substantial periods by numerous persons, was tired, and was without sleep, food, water or friendly counsel. He was stripped of his clothing and subjected to a humiliating examination of his private parts. He was confronted by the victim's step-mother. In the early morning hours and after more than 14 hours during which he steadfastly maintained innocence, he was transferred from one police office to another for further questioning. The inquisition continued after the arraignment —Phillips was brought to various locations allegedly involved in the crime; he was taken to the police laboratory; he was interviewed by a psychiatrist who obtained an additional confession 26 hours after he was taken into custody. During those 26 hours Phillips had no opportunity whatever for sleep, with the possible exception of some unspecified length of time spent in a detention pen between the hours of 7:00 A.M. and 10:00 A.M., May 14th, subsequent to his first and second confessions (573-574).

The record does not explain why Phillips was brought from Hempstead, beyond Mineola, to the 3rd Precinct in Williston Park, rather than to Mineola police headquarters where he ultimately confessed and was arraigned. Neither does the record explain why the prosecuting attorney did not participate in the questioning by police even though present in the same building (609-611) or why the stenographer who transcribed the first confession was evidently not summoned to police headquarters until long after he had been alerted (538-540).

Just prior to confessing, Phillips was deceptively informed that Sunday's blood had been found on his clothing (1430), and it was implied that he would be "sunk" if he did not confess (1437). Statements in his confession indicate that he was overborne by long questioning and had succumbed to and adopted the suggestions of his inquisitors. For example (1461, 1450):

> "Q. Well, that was to make sure she was dead, wasn't it, Mr. Phillips? A. That reasoning on your part is as good as anything I could give. I don't recall having any reason whatsoever. It possibly is true."
>
> * * * * * * *
>
> "Q. After you went down Greenwich Street you got excited, did you? A. Yes, I must have. So much of it is blank. I can't fill it in. I can't recall the whole thing step by step. Some things I can remember and some is like a dream. Very hazy."

Many of Phillips' answers indicate that his mind was unclear and that he was merely relating what he "guessed" or "thought" he had done, what "probably" or "must have" occurred (1438-1441; 1443, 1445, 1450, 1451, 1459-1461). Phillips testified that he had been "beaten around and forced to do different things"; that the constant and prolonged interrogation for almost two days had left him in a state of shock; that he "was almost in a state of brainwash" and "couldn't have been in a reasonable state of mind in order to be able to reason an answer"; that he "had no alternative" and, when questioned by the District Attorney, he repeated the versions of the crime given him by the detectives, that being the "easiest way" out (805-808).

Although Detectives Rofheart and Stark denied that Phillips had been threatened or subjected to coercion, those denials are inadequate since he was questioned by and left alone with police officers who did not testify. The failure of the prosecution to produce those witnesses, who were clearly within its control, gives rise to the inference that their testimony would have been favorable to Phillips. (See e.g., *The New York,* 175 U.S. 187, 204-205; *Kirby* v. *Tallmadge,* 160 U.S. 379, 383; 2 Wigmore on Evidence, 3d Ed. Sec. 284 *et seq.*). If such an inference is not drawn, a situation is created where, for all practical purposes, the defendant—whose long detention was witnessed only by police and other agents of The People—is saddled with the burden of proof on the issue of voluntariness although such burden rightfully rests upon the prosecution. (See *Speiser* v. *Randall,* 357 U.S. 513, 523-524).

It is only proper in considering Phillips' claim of mistreatment by the police that account be taken of the manner in which that claim was presented on the trial by his court-assigned counsel. Defense counsel sought to exclude the confessions on the ground that they were coerced but made no attempt to elicit any evidence on that issue from Phillips. The latter's testimony in that respect, i.e. that he had been "beaten around" and "brainwashed", etc., was given while under cross-examination by the prosecuting attorney and was, perforce, of a general character (805-808). However, that testimony, general though it was, when considered along with the other circumstances surrounding petitioner's extended detention and interrogation, fully demonstrates the impact upon him of the coercive measures employed by the authorities.

The situation in which Phillips found himself at the hands of the police was certainly no less unconscionable or inherently coercive than those involved in *Malinski* v.

New York, 324 U. S. 401, *Spano* v. *New York,* 360 U. S. 315, *U. S. ex rel. Caminito* v. *Murphy* (2d Cir. 1955) 222 F.2d 698, cert. denied 350 U.S. 896; and *U.S. ex rel. Wade* v. *Jackson* (2 Cir. 1958) 256 F.2d 7, cert. denied 357 U.S. 908, where confessions were held inadmissible as a matter of law.

In the *Malinski* case the accused was questioned occasionally for ten hours before giving his first confession which was held to be involuntary. Evidence of violence, being disputed, was ignored. The accused was permitted to see no one except one friend. He had been stripped and was naked for a few hours, and was partially clothed for several hours. According to the District Attorney, this was done to "humiliate" him and he was not "hard to break". Here are analogous facts—the humiliating stripping of Phillips, the washing of his privates and Detective Rofheart's admission that he was detained so that the police could "exact" a confession.

Several aspects of the *Caminito* and *Wade* cases, *supra,* are present here, viz., the use of deceptive tactics to extract a confession, a claim by the accused that words were put in his mouth, an unexplained failure of the District Attorney to participate in questioning although present in the same building, and the failure to explain the transportation of the accused for questioning to a point other than the place of arraignment. There are additional similarities: lack of food and drink (although offered), failure of the accused to speak clearly while under questioning, and unsatisfactory denials by the police of the use of violence.

In the *Spano* case, after about only eight hours of questioning by various police officers, the accused confessed notwithstanding his initial refusals to answer based on advice of his counsel. A police officer, as did Inspector

Pribyl herein, sought to take advantage of his acquaintanceship with the accused.

True, the interrogation of Spano followed his indictment, but, as is clear from the opinion of this Court, that fact was significant because it demonstrated "the undeviating intent of the officers to extract a confession * * * ". (360 U.S. at p. 324). That very same intent is demonstrated in this case by the questioning of Phillips for approximately twelve hours after the police were seemingly satisfied that he was the guilty party and, according to their own admission, had enough proof to warrant arraignment. Detective Rotheart freely conceded that Phillips was retained in custody so as to "exact" a confession. Numerous facts show that the police were satisfied that they had "their man", already had proof sufficient to arraign and indict Phillips, and believed that a confession was forthcoming provided they persevered in their "softening-up" process:

> Phillips, with his past record* and relationship with Sunday and her stepmother, was a "natural suspect".
>
> According to the stepmother's testimony, Phillips had a motive. Shortly prior to Sunday's disappearance, the stepmother sought to terminate her illicit affair with Phillips and told him to "get out" of her life. Phillips threatened that he would not get out "alone".
>
> On the day of her disappearance, Sunday was seen by a classmate entering an automobile similar to that owned by Phillips. The driver was a negro wearing a white cap and tan jacket. Phillips, a negro, owned a white cap and tan jacket.

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* Sex offenses against minor females (26, 704-711).

. .tive Rofheart abruptly called upon and apprehended Phillips after having interviewed Sunday's stepmother and classmates.

Peanut shells were found in the victim's hair and also on the rear floor of Phillips' automobile (486, 492).

Phillips was first taken by Detective Rofheart from Hempstead, not to Mineola where he finally confessed and was arraigned, but beyond Mineola to the Third Precinct in Williston Park.

The Police persisted in their questioning notwithstanding Phillips' steadfast denial of guilt and seemingly plausible alibi.

Although the police believed that they had sufficient proof to warrant arraignment, they made no effort to ascertain whether or not a magistrate was available.

Phillips, while still claiming innocence, was transported to Mineola in the early morning and confessed shortly thereafter.

The marathon interrogation was conducted by changing personnel—Phillips was questioned by persons of progressively higher rank, first by detectives, a sergeant and a lieutenant, subsequently by inspectors and captains, then by Chief Pinnell and ultimately by the Assistant District Attorney who procured the first confession and conducted the trial for the prosecution.

The stenographer who transcribed Phillips' first confession was alerted several hours before Phillips confessed and at a time when Phillips was maintaining innocence. The stenographer was not actually summoned to police headquarters until shortly before Phillips agreed to confess.

The record contains no explanation of the failure of the prosecuting attorney, who was present in the

same building, to participate in the questioning until shortly before Phillips confessed.

When Phillips finally agreed to confess, the prosecuting attorney stated that he had previously known of Phillips' guilt.

The interrogation of Phillips continued after his arraignment.

There is nothing in the record to indicate that anyone other than Phillips was ever under suspicion.

All these matters indicate that the police were satisfied with Phillips' guilt and that a confession, which would simplify the prosecution, was forthcoming provided he was worn down. Thus it is clear that the interrogation continued not because, in the words of the *Spano* case, the police were merely "trying to solve a crime or absolve a suspect", but rather because they "were concerned primarily with securing a statement from defendant on which they could convict him", and because of their "undeviating intent * * * to extract a confession". (360 U.S. 315, 323-324).

Since, as aforesaid, the presence of other evidence which might serve as a sufficient basis for conviction is irrelevant, we have not treated other evidence such as Phillips' own testimony when he took the stand only after the unsuccessful efforts of defense counsel to exclude the confessions. However, in this connection it is well to note that Phillips' testimony was that he was in a temporary "blackout" when the rape and murder were committed. This and other testimony of the petitioner, coupled with portions of the testimony given by the defense psychiatrist, might well have brought about a different verdict if the confessions had not been admitted into evidence. In the absence of the confessions, the jurors may well have been dissatisfied with the proof of guilt and, in any event,

if convinced of petitioner's guilt, may have recommended clemency as part of their verdict.

In considering the effect of the detention and interrogation upon Phillips' will and ability to withstand the coercive and overbearing pressures exerted upon him, it should be noted that he definitely had a mental or personality defect even though he was a high school graduate with better than average intelligence quotient (833-837, 1002).

The circumstances under which the confessions were procured convincingly demonstrate that they were the product not of Phillips' free choice but of overbearing treatment and the suction process of interrogation.

The trial court erred not only in submitting to the jury confessions inadmissible as a matter of constitutional law, but compounded that error by the improper manner in which those confessions were submitted. As appears from *Stein* v. *New York*, 346 U.S. 156, where there is conflicting evidence on the issue of voluntariness that issue is determined not by the trial judge, but rather by the jury, and the confessions are admitted only *tentatively* or *provisionally* by their submission to the jury with binding instructions that they be ignored if found involuntary. The trial court gave no such binding instructions here. In effect the charge to the jury permitted the consideration of the confessions merely if they were found truthful*. Thus they were neither provisionally nor tentatively received in keeping with the *Stein* case. As a result, Phillips was actually convicted without any finding by either judge or jury that his confessions were, *in fact*, voluntarily given.

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* The charge permitted the jury to rely on the confessions merely if truthful (1230). While the court stated that the confessions must be voluntary, it defined a voluntary confession as

It is submitted that the use made of Phillips' confessions "deprived him of that fundamental fairness essential to the very concept of justice, and hence, denied him due process of law, guaranteed by the Fourteenth Amendment." (*Payne* v. *Arkansas*, 356 U.S. 560, 567).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

ANTHONY T. ANTINOZZI
Counsel for Petitioner

Of Counsel:

HENRY W. SCHOBER
FRANK A. FRITZ, JR.

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a truthful confession, i.e., as a confession "not produced by fear or under such circumstances *as to lead one to believe it was not the truth*" (1234) and refused to charge that the jury should consider whether petitioner was detained for the purpose of extracting a confession (1279-1281). The overall effect of the charge was that the confessions, if true, were voluntary and could be considered as proof of guilt.